Public Prosecutor v Lew Koy

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO 41–04 OF 2001
VT SINGHAM JC
27 APRIL 2001

Criminal Procedure *— Acquittal or discharge — Acquittal of accused without hearing prosecution's case — Preliminary objections raised by accused's counsel — Magistrate acquitted and discharged accused after upholding preliminary objections — Whether acquittal justified*

Criminal Procedure *— Consent or sanction — Sanction — Offences under Food Act 1985 — Whether sanction required to be given by Public Prosecutor to institute prosecution for offences under Food Act 1985 — Effect of lack of sanction*

Criminal Procedure *— Food and drugs — Sale of — Pig's liver containing beta agonist or salbutamol — Whether proceedings against respondent instituted within 90 days from date of purchase — Whether expiration of 90 day was to be determined on date when complaint was filed in court by Ministry of Health or when respondent was charged in court — Food Act 1985 s 19(2)*

Food and Drugs *— Sale — Pig's liver containing beta agonist or salbutamol — Charge under s 13(1)(e) of Food Act 1985 — Whether proceedings instituted within 90 days from date of purchase — Whether expiration of 90 day was to be determined on date when complaint was filed in court by Ministry of Health or when respondent was charged in court — Food Act 1985 s 19(2)*

The respondent was charged under s 13(1)(e) read with s 13(3)(d) of the Food Act 1985 ('the Act') and punishable under s 13(1) of the Act for selling pig's liver ('the food') containing beta agonist (salbutamol) which was a prohibited drug residue to be used in food. The magistrate upheld two preliminary objections raised by the respondent's counsel and discharged and acquitted the respondent. In respect of the first preliminary objection, the magistrate held that sanction from the Public Prosecutor was required for the prosecuting officer to commence the proceedings for the offence under the Act and that since the consent was not tendered as an exhibit by the prosecuting officer, the court did not have jurisdiction to hear the case. As for the second preliminary objection, the magistrate held that the proceedings against the respondent were instituted after the expiration of 90 days in contravention of s 19(2) of the Act. The food was purchased on 31 January 2000 and the Ministry of Health filed the complaint in court on 26 April 2000. The respondent was charged in court on 26 June 2000. The deputy public prosecutor appealed against the order of acquittal and discharge of the respondent.

Held, allowing the appeal:

(1) A sanction was given by the Public Prosecutor to institute prosecution for certain offences or prescribed offences and if this sanction was required under a particular Act before a prosecution

could commence, it would be expressly stipulated in the particular Act of the offence charged. Where a sanction was required to prosecute, the lack of it deprived the court of jurisdiction. In the instant case, there was no requirement that a sanction be obtained before the criminal proceedings were commenced in the magistrate's court (see pp 663H–664B).

(2) An authorization letter, on the other hand, referred to conduct of prosecutions in the magistrate's court where an officer of the government department, local authority, statutory authority or body or any person employed or retained in any local authority or any statutory authority or body was authorized in writing by the Public Prosecutor to conduct prosecutions in the magistrate's court pursuant to s 377(b) of the Criminal Procedure Code. In the instant appeal, an officer of the Ministry of Health appeared at the magistrate's court and his appearance in court to conduct the prosecution was not challenged by the respondent's counsel (see p 664C–D).

(3) In any event, there was no necessity to tender or file the authorization letter in court but the prosecuting officer was only required to show the written authority to court if ever there was any challenge that the prosecution officer did not have the authority in writing of the Public Prosecutor to appear in court and conduct the proceedings (see p 666D–E).

(4) The expiration of the 90 day period specified in s 19(1) of the Act was to be determined on the date when the complaint was filed in court by the Ministry of Health and not on the date when the respondent was charged in court (see p 668E). Accordingly, since the complaint was filed in court by the Ministry of Health on 26 April 2000, the proceedings were instituted against the respondent well before the expiration of the 90 day requirement as stipulated under s 19(2) of the Act (see p 671D–E).

(5) Sections 173(c) and (f) of the Criminal Procedure Code did not empower the magistrate to order an acquittal without hearing the evidence of the prosecution. Therefore, the order of acquittal and discharge by the magistrate was not correct as even if she had concurred with the preliminary objections, she could have only discharged the respondent not amounting to acquittal and not grant a complete acquittal as was done in the instant case (see p 672A–B).

[Bahasa Malaysia summary

Penentang dituduh di bawah s 13(1)(e) dibaca dengan s 13(3)(d) Akta Makanan 1985 ('Akta tersebut') dan boleh dihukum di bawah s 13(1) Akta tersebut kerana menjual hati khinzir ('makanan tersebut') yang mengandungi beta agonist (salbutamol) yang merupakan satu sisa dadah yang dilarang digunakan dalam makanan.

Majistret membenarkan dua bantahan permulaan yang dibangkitkan oleh peguam penentang dan melepas dan membebaskan penentang. Berhubung dengan bantahan permulaan pertama, majistret memutuskan bahawa sanksi dari Pendakwa Raya adalah dikehendaki untuk membolehkan pegawai pendakwa memulakan prosiding untuk kesalahan di bawah Akta tersebut dan oleh kerana persetujuan tidak dikemukakan sebagai satu ekshibit oleh pegawai pendakwa, mahkamah tidak mempunyai bidang kuasa untuk mendengar kes tersebut. Berhubung dengan bantahan permulaan yang kedua pula, majistret memutuskan bahawa prosiding terhadap penentang dimulakan selepas luputnya tempoh 90 hari bertentangan dengan s 19(2) Akta tersebut. Makanan tersebut telah dibeli pada 31 Januari 2000 dan Kementerian Kesihatan memfailkan aduan di mahkamah pada 26 April 2000. Penentang dipertuduhkan di mahkamah pada 26 Jun 2000. Timbalan pendakwa raya merayu terhadap perintah pelepasan dan pembebasan penentang.

Diputuskan, membenarkan rayuan tersebut:

(1) Sanksi telah diberikan oleh Pendakwa Raya untuk memulakan pendakwaan untuk kesalahan tertentu atau kesalahan yang ditetapkan dan sekiranya sanksi ini diperlukan di bawah suatu Akta tertentu sebelum sesuatu pendakwaan boleh dimulakan, ia akan dinyatakan secara nyata dalam Akta tertentu kesalahan yang dipertuduhkan. Di mana sanksi diperlukan untuk mendakwa, ketiadaannya melucutkan mahkamah daripada bidang kuasa. Dalam kes ini, tiada keperluan bahawa sanksi hendaklah diperolehi sebelum prosiding jenayah dimulakan di mahkamah majistret (lihat ms 663H–664B).

(2) Sepucuk surat pemberikuasaan merujuk kepada penjalanan pendakwaan di mahkamah majistret di mana seorang pegawai jabatan kerajaan, pihak berkuasa tempatan, pihak berkuasa atau badan berkanun atau sesiapa yang bekerja di mana-mana pihak berkuasa tempatan atau mana pihak berkuasa atau badan berkanun diberikuasa dalam bentuk bertulis oleh Pendakwa Raya untuk menjalankan pendakwaan di mahkamah majistret menurut s 377(b) Kanun Acara Jenayah. Dalam rayuan ini, seorang pegawai Kementerian Kesihatan hadir di mahkamah majistret dan kehadirannya di mahkamah untuk menjalankan pendakwaan tidak dicabar oleh peguam penentang (lihat ms 664C–D).

(3) Walau bagaimanapun, tiada keperluan untuk mengemuka atau memfailkan surat memberikuasa di mahkamah tetapi pegawai pendakwa cuma perlu menunjukkan kuasa dalam bentuk bertulis kepada mahkamah sekiranya timbulnya apa cabaran bahawa pegawai pendakwa tidak diberikuasa oleh Pendakwa Raya secara bertulis untuk menghadiri mahkamah dan menjalankan prosiding tersebut (lihat ms 666D–E).

(4) Peluputan tempoh 90 hari yang ditetapkan dalam s 19(1) Akta tersebut haruslah ditentukan pada tarikh apabila aduan difailkan di mahkamah oleh Kementerian Kesihatan dan bukannya pada tarikh apabila penentang dipertuduh di mahkamah (lihat ms 668E). Oleh itu, memandangkan aduan difailkan di mahkamah oleh Kementerian Kesihatan pada 26 April 2000, prosiding ini telah dimulakan terhadap penentang sebelum luputnya keperluan tempoh 90 hari seperti yang ditetapkan di bawah s 19(2) Akta tersebut (lihat ms 671D–E).

(5) Seksyen-seksyen 173(c) dan (f) Kanun Acara Jenayah tidak memberi kuasa kepada majistret untuk memerintah pembebasan tanpa mendengar keterangan dari pihak pendakwa. Maka, perintah pembebasan dan pelepasan oleh majistret tidak sempurna kerana biarpun beliau telah bersetuju dengan bantahan permulaan, beliau hanya boleh melepaskan penentang tidak berjumlah kepada pembebasan dan bukannya membenarkan pembebasan sepenuh seperti yang dilakukan dalam kes ini (lihat ms 672A-B).]

Notes

For cases on acquittal or discharge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 67–122.

For cases on consent or sanction, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1261–1278.

For cases on sale of food and drugs, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1624 and 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3351–3361.

Cases referred to

Abdul Hamid v PP [1956] MLJ 231 (refd)
AK Koh Enterprise Sdn Bhd v PP [2000] 6 MLJ 184 (refd)
Carlsberg Brewery Malaysia Bhd v Pendakwa Raya [1993] 1 MLJ 273 (refd)
Chu Chee Peng v PP [1973] 2 MLJ 35 (refd)
Datuk Seri S Samy Vellu v S Nadarajah [2000] 4 MLJ 696 (refd)
Hassan bin Isahak v PP [1948-49] MLJ Supp 179 (refd)
Hj Mohd Paiman v PP [1966] 1 MLJ 58 (refd)
Joginder Singh v PP [1984] 2 MLJ 133 (refd)
Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors [2000] 5 MLJ 116 (refd)
Ng Chuan & Anor v Rex [1948] 14 MLJ 185 (refd)
Nguang Chan Sdn Bhd v PP [2001] 1 MLJ 129 (refd)
Perumal v PP [1970] 2 MLJ 265 (refd)
PP v Bata (M) Bhd [2000] 3 CLJ 433 (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
PP v Jamil bin Jilap & Ors [2000] 5 MLJ 311 (refd)

A *PP v Lee Chwee Kok* [1979] 1 MLJ 45 (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65 (refd)
PP v Mahmud [1974] 1 MLJ 85 (refd)
PP v Mat Zain [1948-49] MLJ Supp 142 (refd)
PP v Oladotun Lukmaru Umaru & Ors [1991] 1 MLJ 187 (refd)
B *PP v Ooi Lye Seng* [1991] 2 MLJ 332 (refd)
PP v Soon Tiew Choon [1976] 1 MLJ 189 (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100 (refd)
Abu Kassim, Re [1964] MLJ 12 (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681 (refd)
Tang Shew Kai v Reg [1956] MLJ 229 (refd)
C *Yek Tieng Sing & Ors v PP* [1971] 2 MLJ 94 (refd)

Legislation referred to

Criminal Procedure Code ss 129(1), 173(c), (f), 376(iii), 377(b), 380(ii)(b), 422
D Employees Provident Fund Act 1951 ss 16A(1)(c), 18(1)
Federal Constitution art 145(3)
Food Act 1985 ss 13(1)(e), (3)(d), 19(2)
Immigration Act 1959/63 s 61C
Sale of Food and Drugs Ordinance (Cap 148) s 20(4)
Securities Commission Act 1983 s 392(2)
E Securities Industries Act 1983 ss 86, 126(2)
Trade Descriptions Act 1972 s 28B(3)

Abdul Hakim Amir bin Ahmad Nordin (Deputy Public Prosecutor) for the appellant.

Fong Poh Kuan (*Ngeh & Co*) for the respondent.

F **VT Singham JC:.** This is an appeal by the learned deputy public prosecutor against the order of acquittal and discharge of the respondent by the learned magistrate of the Magistrate's Court, Kuala Kangsar on 10 January 2001, as a result of two preliminary objections raised by the defence counsel namely:

G (1) the prosecution did not tender a sanction from the Public Prosecutor when the proceedings were commenced as required under art 145(3) of the Federal Constitution ('the Constitution') and therefore the proceedings were ultra vires;

(2) the proceedings were commenced after the expiration of 90 days from
H the time the food was purchased in contravention of s 19(2) of the Food Act 1983 ('the Act').

The respondent, aged 46 years, was charged at the Magistrate's Court Kuala Kangsar on 26 June 2000 as follows:

I Bahawa kamu selaku penjual bahan makanan iaitu hati khinzir bertempat di premis No 322, Jerlun NV, 33000 Kuala Kangsar, Perak, pada lebih kurang jam 9.30 pagi, ada menjual kepada Kamaruzzaman Bin Ab Aziz, Kad Pengenalan No 560307–08–5949, seorang Pegawai Berkuasa di bawah Akta

Makanan 1983 dan Pejabat Kesihatan, Kuala Kangsar, bahan makanan iaitu hati khinzir. Setelah dianalisa didapati bahan makanan tersebut mengandungi beta agonist (salbutamol) iaitu sejenis residu drug yang dilarang digunakan di dalam makanan mengikut peraturan 40(5) dan dibaca bersama Jadual 15(A) Daftar II kepada Peraturan-Peraturan Makanan 1985.

Oleh itu, kamu telah melakukan satu kesalahan di bawah s 13(l)(e) dan dibaca dengan s 13(3)(d) kepada Akta Makanan 1983 iaitu menjual bahan makanan yang diadukkan dan boleh dihukum dibawah s 13(1) kepada Akta yang sama.

On hearing the preliminary objections by Ms Fong Poh Kuan, the respondent's counsel, and the reply by Mr Dass Kandunni, the prosecuting officer on the first issue, the learned magistrate, inter alia, held that the sanction was required for the prosecuting officer to commence the proceedings for the offence under the Act, and that it must be tendered to the court as an exhibit before the trial began so as to confer jurisdiction on the court. She held that in this case, there was no sanction tendered in court as an exhibit by the prosecuting officer and therefore the court had no jurisdiction to hear the case. She upheld the preliminary objection and acquitted and discharged the respondent. Article 145(3) of the Constitution states: 'The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a Court Martial'.

On the second issue, the learned magistrate held that the proceedings against the respondent was instituted after the expiration of 90 days from the time the food was purchased on 31 January 2000 and the 90 days expired on 30 April 2000, and the respondent was charged in court only on 26 June 2000. She upheld the preliminary objection. Accordingly, the learned magistrate acquitted and discharged the respondent of the charge on both the grounds, as raised by the defence counsel. In allowing the preliminary objection on the issue of sanction, the learned magistrate relied on *Ak Koh Enterprise Sdn Bhd v PP* [2000] 6 MLJ 184 and *Datuk Seri S Samy Vellu v S Nadarajah* [2000] 4 MLJ 696. On the requirement of instituting proceedings before the expiration of 90 days from the time the food was purchased, she relied on *Carlsberg Brewery Malaysia Bhd v Pendakwa Raya* [1993] 1 MLJ 273 and *Perumal v PP* [1970] 2 MLJ 265. Section 19(2) of the Act states 'where any food has been purchased or procured from any person for analysis or examination, no proceeding as in respect of the sale thereof or of any offence against the Act shall be instituted after the expiration of 90 days from the time of purchasing or procuring that food'. The prosecution was dissatisfied with the decision and filed a notice of appeal on 16 January 2001 to appeal to the High Court. Hence, this appeal.

On appeal, the learned deputy public prosecutor submitted as follows:

(1) on the issue of sanction, he submitted that the learned magistrate had erred in law when she held that the sanction was required and it should be tendered to the court as an exhibit before the

commencement of the proceedings. He submitted that no sanction was required under the Act, and the magistrate was wrong in law when she upheld the preliminary objection raised by the respondent's counsel;

(2) on the issue that the respondent was first charged in court after the expiration of 90 days from the time of purchasing the food, he submitted that the proceedings were in fact instituted when the complaint was filed in court on 26 April 2000 by the Ministry of Health, and registered in court which was before the expiration of 90 days requirement. He further submitted that the date for the purposes of s 19(2) of the Act was the date when the complaint was filed in court on 26 April 2000, and not the date when the respondent was charged in court on 26 June 2000. Therefore, he submitted that the learned magistrate was wrong in law when she upheld the preliminary objection as raised by the respondent's counsel;

(3) he further submitted that the learned magistrate was wrong in law when she acquitted and discharged the respondent as she had not heard the evidence and that she could only discharge the respondent when she upheld the preliminary objections;

(4) that the appeal should be allowed and a retrial be ordered.

The learned deputy public prosecutor contended that the learned magistrate was wrong when she held that under art 145(3) of the Constitution the prosecution must obtain the sanction to commence the proceedings, and he urged this court to disregard the decision in *AK Koh Enterprise Sdn Bhd v PP* as it was confusing and not clear as to whether his Lordship in that case was referring to a sanction or a letter of authority from the Public Prosecutor for the prosecuting officer to appear in court and conduct the prosecution on behalf of the prosecution, and whether his Lordship was also referring to the constitutional powers of the Public Prosecutor under art 145(3) of the Constitution. In *AK Koh Enterprise Sdn Bhd v PP*, his Lordship Muhammad Kamil J said that since the respondent was charged for a seizable offence, a sanction or authorization to prosecute an offence under the Act was mandatory. In that case, his Lordship Muhammad Kamil J held that:

> It is clear that under art 145(3) of the Federal Constitution the Public Prosecutor (ie the Federal Attorney General) is vested with the power to institute, conduct or discontinue any criminal proceedings. There is a number of authorities on this point: *Repco Holdings Bhd v PP* [1997] 3 MLJ 681 (CA); *PP v Lee Ming & Anor* [1998] 4 MLJ 113; and *PP v Tamil Filap & Ors* [2000] 5 MLJ 311.
>
> A prosecuting officer may, under a particular law, institute a criminal proceeding but he must be authorized by the Public Prosecutor. Such an *authorization* or *sanction* to prosecute is required for each offence, and it must be tendered into the court before the trial begins. Without an authorization from the Public Prosecutor, it ultra vires the law and the proceeding would be a nullity. (Emphasis added.)

On the other hand, the learned counsel for the respondent, Ms Fong Poh Kuan submitted as follows:

(1) no proceedings could be instituted against a defendant without a prior sanction of the Public Prosecutor as provided under art 145(3) of the Constitution. She contended that without the sanction from the Public Prosecutor, the magistrate had no jurisdiction to hear the case. She relied on *AK Koh Enterprise Sdn Bhd v PP* which was a decision of the High Court, Kuching;

(2) the proceedings against the respondent was not instituted before the expiration of 90 days from the date of purchasing the food. In the instant appeal, she contended that the food was purchased on 31 January 2000, whereas the respondent was charged in court only on 26 April 2000, which was very much after the expiration of 90 days as required under s 19(2) of the Act. The learned counsel for the respondent relied on *Perumal v PP* and *Carlsberg Brewery Malaysia Bhd v Pendakwa Raya*, and submitted that the learned magistrate was correct when she found that the proceedings in the instant appeal were instituted after the expiration of 90 days.

This court is of the respectful view that there was certainly a confusion and a basic fallacy in *AK Koh Enterprise Sdn Bhd v PP* as no distinction was drawn between a sanction, as required under s 129(1) of the Criminal Procedure Code ('the CPC'), an authorization letter pursuant to s 377(b) of the CPC, which is given to a prosecuting officer to conduct prosecution in the lower courts and the constitutional powers of the Public Prosecutor as provided under art 145(3) of the Constitution. In fact, in *AK Koh Enterprise Sdn Bhd*'s case, the only issue before the court was on the authorization letter pursuant to s 377(b) of the CPC, but with respect, it was mixed up and confused with a sanction. In *AK Koh Enterprise Sdn Bhd*, there was an appeal by the accused against the decision by the learned magistrate who had allowed the prosecuting officer of the medical department 'to institute the criminal proceedings' against the accused without the authorization letter of the Public Prosecutor to confirm his locus standi in court. Nevertheless, with respect, it is not clear as to whether his Lordship was referring to a sanction and an authorization letter as one and the same issue in that case. On one hand, his Lordship said that the appeal was against the decision of the learned magistrate who allowed the prosecuting officer 'to institute criminal proceedings' against the appellant without the authorization letter of the Public Prosecutor, and by this it would appear that his Lordship was referring to the locus standi of the prosecuting officer to conduct the prosecution as the only issue in that appeal. On the other hand. His Lordship, in arriving at a decision, had also considered the following cases, namely, *Hassan bin Isahak v PP* [1948–49] MLJ Supp 179, *Ng Chuan & Anor v Rex* [1948] 14 MLJ 185 and *Lyn Hong Yap v PP* [1956] 22 MLJ 226 which cases are all in reference to a sanction and which are entirely two separate matters and the issue of sanction has no relevance to the issue of the authorization letter which in fact is in reference to the locus standi of the prosecuting officer who conducted the prosecution.

A However, in arriving at a decision, the following cases were also considered, namely, *Repco Holdings Bhd v PP* [1997] 3 MLJ 681, *PP v Lee Ming & Anor* [1998] 4 MLJ 113 and *PP v Jamil bin Jilap & Ors* [2000] 5 MLJ 311, which cases are all in reference to the locus standi of the prosecuting officer to conduct prosecutions and not as to the jurisdiction of the learned magistrate pursuant to s 129(1) of the CPC to proceed with the B trial which are entirely two separate matters. Further still, reference was made to an authorization letter in that case when it is stated in the grounds of judgment that the learned magistrate 'seemed confused' when his Lordship said:

> C The prosecution averred that an *authorization letter* dated 11 April 1998 was issued to the prosecuting officer prior to the proceedings. That is to say, the authorization had been issued prior to the trial which began on 10 November 1998. According to the notes of proceedings for 10 November 1998, 1 March 1999, 14 June 1999 and 9 September 1999 (pp 1–5 of the appeal record) the learned magistrate had not made any record of this *authorization letter* dated 11 April 1998. However, he mentioned of two authorization viz, one written D on 1 April, 1998 (at p 7 of the appeal record) and the other impliedly, on 1 August 1998 (at p 8 of the appeal record) which gave the prosecuting officer the locus standi. He seemed confused. Much confusion in the magistrate's mind could have been avoided if the said *authorization letter* dated 11 April 1998 was shown to him or tendered into court on 10 November 1998 when the trial began. In the notes of proceedings, there is nothing on record to show E that the said *authorization letter* was tendered in court when the trial began. (Emphasis added.)

In his conclusion, the learned judge said that:

> F In my judgement it is clear that no *authorization letter* was produced or tendered in court when the trial began. There is no room for presumption when it comes to the interpretation of a statute. The practice adopted by the learned magistrate was ultra vires the law. Without this authorization, *the court lacks jurisdiction to hear the case*. This defect cannot be cured. (Emphasis added.)

This court with respect is unable to follow the reasoning in *AK Koh* G *Enterprise Sdn Bhd* as stated above as there was no distinction drawn between (a) *the constitutional powers of the Public Prosecutor* as provided under *art 145(3) of the Constitution*, (b) the requirement for a *sanction* under s 129(1) of the CPC, (c) an *authorization* letter under s 377(b) of the CPC and (d) the *consent* of the Public Prosecutor which are entirely separate matters and have separate functions. Article 145(3) of the Constitution H deals with the constitutional powers given to the Attorney General who is the Public Prosecutor to institute, conduct or discontinue any criminal proceedings for an offence except proceedings before a Syariah Court, a Native Court or a Court Martial. A *sanction* is given by the Public Prosecutor to *institute prosecution* for certain offences or prescribed offences and if this *sanction* is required under a particular Act before a prosecution I could commence it will be expressly stipulated in the particular Act of the offence charged, for instance, offences under the Immigration Act 1959/63 (s 58(2)) which contains an express provision that 'no prosecution shall be

instituted in respect of any offence against this Act without the *sanction* in writing of the Director General or of the Public Prosecutor or his deputy.' Consequently, without the *sanction* being produced and filed in court, the magistrate's court cannot take cognizance of the offence under the Immigration Act 1959/63 and does not have the jurisdiction to hear the case (see s 129(1) of the CPC). Where a *sanction* is required to prosecute, the lack of it deprives the court of jurisdiction (see *Ng Chuan & Anor v Rex* [1948] MLJ 185, *Re Abu Kassim* [1964] MLJ 12 and *Haji Mohamed Paiman v PP* [1966] 1 MLJ 58). However, the Act does not contain such express provision for the requirement of a *sanction* before the criminal proceedings is commenced in the magistrate's court.

On the other hand, an *authorization* letter refers to conduct of prosecutions in the magistrate's court where an officer of any Government Department, an officer of any local authority, an officer of statutory authority or body or any person employed or retained in any local authority or any statutory authority or body are *authorized in writing* by the Public Prosecutor to conduct prosecutions in the magistrate's court (see s 377(b) of the CPC which came into effect on 1 April 1998 (Amendment) Act 1998). In the instant appeal, an officer from the Ministry of Health appeared at the magistrate's court and his appearance in court to conduct the prosecution was not challenged except for the preliminary objection that there was no *sanction* from the Public Prosecutor to institute the proceeding in court.

In *Abdul Hamid v PP* [1956] MLJ 231, his Lordship Smith J drew a distinction between a *sanction* and a *consent* and the rights and powers contained in s 376(iii) of the CPC which has since been amended. His Lordship Smith J said:

> There is an essential difference to my mind between a *sanction* and a *consent*. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since '*consent*' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side (*Stroud* (3rd Ed) Vol I at p 582). The *sanction* was therefore no evidence of consent. However, I satisfied myself from evidence given by the learned deputy public prosecutor that he had in fact fully applied his mind to the particular case and had consented before signing *Ex Pr* (*R v Metz*, followed). (Emphasis added.)

In the circumstances, this court is of the view that the real issue in *AK Koh Enterprise Sdn Bhd* which both the learned defence counsel and the learned magistrate in the instant appeal had relied on was actually in reference to the *authorization* letter pursuant to s 377(b) of the CPC and as to the *locus standi* of the prosecuting officer and not in respect of a *sanction* pursuant to s 129(1) of the CPC to commence proceedings in court. Accordingly, this court is of the view that the learned magistrate in the instant appeal was certainly misled, firstly, in raising the preliminary objection that there was a requirement for a *sanction* when in fact there was no such requirement under the Act and secondly, in failing to distinguish the facts in *AK Koh Enterprise Sdn Bhd*. On this ground alone, the appeal by the learned Public Prosecutor ought to be allowed.

In order to have a clear understanding of the *constitutional powers of the Public Prosecutor* under art 145(3) of the Constitution, a *sanction*, a *consent*, an *authorization* letter, it is relevant to distinguish once again and reproduce the following for the sake of convenience:

Article 145(3) of the Constitution is the constitutional powers given to the Attorney General which states:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

Accordingly, by art 145(3) of the Federal Constitution, the Attorney General who is the Public Prosecutor is clothed with the power to conduct proceedings in court, in all Magistrate's Courts, Sessions Courts, the High Courts and the Superior Courts (see s 3 of the Courts of Judicature Act 1964 for the meaning of 'court').

In *Repco Holdings Bhd v PP*, his Lordship Gopal Sri Ram JCA interpreted art 145(3) of the Constitution that the Attorney General is the sole authority to institute, conduct and discontinue criminal proceedings. In that case, the Securities Commission instituted proceedings against the accused for an offence in contravention of s 86 of the Securities Industries Act 1983 ('the SI Act'). Two officers of the Securities Commission appeared in court to prosecute the case. Counsel who represented the accused took preliminary objection to the locus standi of the two officers who represented the Securities Commission to prosecute the case pursuant to s 126 of the SI Act and s 392(2) of the Securities Commission Act 1983 ('the SC Act') which gives the Chairman of the Commission the power to authorize in writing to any officer of the Commission to conduct the prosecution of any offence under the Act. In declaring s 126(2) of the SI Act and s 392(2) of the SC Act to be unconstitutional, null and void and of no effect, his Lordship Gopal Sri Ram JCA held that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney General who is the Public Prosecutor and that the Chairman of the Securities Commission is not authorized lawfully ie to say constitutionally, to authorize or conduct prosecutions under the SI Act. However, his Lordship made it clear that if the registrar of companies who is usually a senior member of the judicial and legal service is a gazetted deputy public prosecutor and if he conducts the prosecution in such capacity of an offence under the SI Act, the prosecution of the offence would not be caught by art 145 of the Constitution.

A *sanction* in practice is usually given by a deputy public prosecutor without any deep consideration of the particular facts in detail and this is given pursuant to s 129(1) of the CPC and for offences expressly required under the particular Act or for prescribed offences.

In *Haji Mohamed Paiman v PP* [1966] 1 MLJ 58, the accused was charged for an offence made under s 61C of the Immigration Ordinance 1959 (now Immigration Act 1959/63) an offence of knowingly harbouring an illegal immigrant. The accused was convicted by the learned magistrate.

On appeal to the High Court, the conviction was quashed as there was no *written sanction* produced when the accused was charged in court and accordingly, the proceedings were held to be a nullity.

A *consent* in practice is given in writing by the Public Prosecutor after full consideration of the entire facts in detail of a particular case or the investigation papers prepared by the relevant investigating agency to institute prosecution (see s 177A(1) of the CPC, *PP v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187, *PP v Lee Chwee Kok* [1979] 1 MLJ 45).

In *Yek Tieng Sing & Ors v PP* [1971] 2 MLJ 94, the Federal Court said that once the Public Prosecutor or the deputy public prosecutor has given a *consent* or certificate, he must be presumed to have gone through into the facts of the case (see *PP v Mohamed Halipah* [1982] 1 MLJ 155).

An authority letter is an authorization given to a person who is not a Public Prosecutor, a senior deputy public prosecutor, a deputy public prosecutor or an assistant public prosecutor to conduct criminal prosecution on behalf of the Public Prosecutor and this is spelt out in s 377(b) of the CPC.

On the issue of the *written authority* from the Public Prosecutor pursuant to s 377(b) of the CPC, this court is of the view that the *written authority* need not be tendered or filed in court but is only required to show to the court if ever there is any challenge that the prosecuting officer who is having conduct of the prosecution did not have the authority in writing of the Public Prosecutor to appear in court and conduct the proceedings. In such a situation, the prosecuting officer is only required to show to the court that he has been issued with the *written authority* by the Public Prosecutor or the deputy public prosecutor and it need not be tendered as an exhibit or filed in court as it is not a document shown to a witness and referred to by him in his evidence or by an affidavit (see *Stroud's Judicial Dictionary of Words and Phrases* (6th Ed) Vol 1 for definition of 'exhibit').

In *Nguang Chan Sdn Bhd v PP* [2001] 1 MLJ 129, the appellant a private limited company was charged for two offences under the Trade Descriptions Act 1972. An assistant Controller of Trade Descriptions appeared in court to conduct the prosecution of the case. Section 28B(3) of the Trade Descriptions Act 1972 stated that 'any prosecution in respect of an offence under this Act may be conducted by an assistant controller.' However, the learned magistrate before the conclusion of the trial transmitted the record of proceedings to the High Court and posed the following questions, namely:

(1) Whether s 28B(3) of Act 87 which allows proceedings to be conducted by an Assistant Controller of Trade Descriptions is ultra vires art 145(3) of the Constitution;

(2) Whether the institution by the Assistant Controller of Trade Descriptions of proceedings under the Act contravenes art 145(3) of the Constitution.

His Lordship KC Vohrah J (as he then was), presently Judge of the Court of Appeal in *Nguang Chan Sdn Bhd v PP* relied on the decision in *Repco*

Holdings Bhd v PP and, inter alia, held that s 28(B)(3) of the Trade Descriptions Act 1972 (Act 87) which allows proceedings to be conducted by the Assistant Controller of Trade Description contravenes art 145(3) of the Constitution and that the proceeding conducted in the magistrate's court was a nullity.

On appeal to the Court of Appeal by the Attorney General against the decision of the learned judge of the High Court, his Lordship Lamin PCA in dismissing the Public Prosecutor's appeal inter alia held that s 28B(3) of the Trade Descriptions Act 1972 is ultra vires of art 145(3) of the Constitution and that the prosecution conducted in the magistrate's court was null and void.

However, it is important to note that the decision in *PP v Bata (M) Bhd* [2000] 3 CLJ 433 was brought to the attention of the Court of Appeal in *Nguang Chan Sdn Bhd v PP* but the Court of Appeal did not disturb the views expressed by his Lordship Low Hop Bing J in that case. In *PP v Bata (M) Bhd*, a similar issue was raised that the prosecuting officer, Mr Bernard Gomez had no power to conduct the prosecution and the learned counsel relied on art 145(3) of the Constitution which states that only the Public Prosecutor has the power to institute, conduct or discontinue prosecutions. In that case, the respondent was charged with an offence under s 16A(l)(c) of the Employees Provident Fund Act 1951 ('the EPF Act'). His Lordship Low Hop Bing J, inter alia, held that the provisions of s 18(1) of the EPF Act must be read conjunctively with art 145(3) of the Constitution and s 376 and the then s 380 of the CPC. His Lordship Low Hop Bing J distinguished the offence in that case as a non seizable offence under the procedure contained in the then s 380(ii) of the CPC whereas the offences in *Repco Holdings Bhd v PP* under the SI Act were seizable offences. His Lordship held that the conduct of prosecution by an officer from the Employees Provident Fund under s 18(1) of the EPF Act did not contravene art 145(3) of the Constitution read with the then s 380(ii)(b) of the CPC until it was amended by Act A1015 with effect from 1 April 1998. For the sake of clarity, it is important to reproduce the provisions of s 18(1) of the EPF Act and the then s 380(ii)(b) of the CPC.

Section 18(a) of the EPF Act reads as follows:

> Prosecutions in respect of any offence against the provisions of this Act or of any regulations or rules made thereunder may be conducted by any officer in writing in that behalf by the chairman of the Board.

Section 380 on 'Prosecutions in summary non-seizable cases' reads:

> Notwithstanding anything in this chapter contained —
>
> (i) any public officer may prosecute in any court in any case or class of cases in which he is by any written law authorized to prosecute in such court;
>
> (ii) in summary non-seizable cases in the court of a magistrate —
>
> (a) the Public Prosecutor or a deputy public prosecutor or a Police Officer may appear and conduct any prosecution;
>
> (b) *any Officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence*

against any written law which it is the duty of the said department or authority specially to enforce; (Emphasis added.)

(c) any private person may appear in person or by advocate or, in the State of Terengganu, by a pleader and prosecute for an offence against his own person or property.

Be that as it may, even if there was a requirement of a *sanction* before the commencement of the proceedings in the instant appeal, s 422 of the CPC make it clear that the want of any *sanction* is only an irregularity unless such omission or want has occasioned a failure of justice (see *Joginder Singh v PP* [1984] 2 MLJ 133 and *Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors* [2000] 5 MLJ 116).

In the circumstances, this court is of the view that there is no requirement for a *sanction* under the Act as contended by the learned counsel for the respondent. Therefore, the learned magistrate had erred in law when she relied on the decision in *AK Koh Enterprise Sdn Bhd*'s case and upheld the preliminary objection which was raised on behalf of the respondent that a *sanction* was required under the Act. Thus, the learned deputy public prosecutor's contention that the learned magistrate was wrong in law must succeed.

As to the second issue, whether the prosecution was caught by the 90 days rule as required under s 19(2) of the Act, this court is of the view that the learned magistrate had once again erred in law when she held that the expiration of the 90 days period was to be determined on the date when the respondent was charged in court on 26 June 2000 and not on the date when the complaint was filed in court by the Ministry of Health on 26 April 2000. Section 19(2) of the Act states:

> (2) Where any food has been purchased or procured from any person for analysis or examination, *no proceedings in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of ninety days from the time of purchasing or procuring that food*. (Emphasis added.)

In *Tang Shew Kai v Reg* [1956] MLJ 229, one of the issues that was raised was that the proceedings was not instituted within the statutory period of 28 days of the purchase of the drug as prescribed by sub-s (4) of s 20 of the Sale of Food and Drugs Ordinance (Cap 148). In that case, the purchase was made on 12 October 1954 and the Food and Drugs Inspector filed the complaint in the city police court on 5 November 1954 but the Summons was not issued by the learned magistrate until 13 November 1954. In that case, it was contended on behalf of the appellant that the relevant date for determining when the proceedings was instituted was the date of issue of summons and that the laying of the complaint in court was not the date of the institution of the proceedings. However, his Lordship Whyatt CJ said that:

> It is necessary to have in mind at the outset that a summons is merely machinery to compel attendance in court and that before any question of compelling a person's attendance can arise, a number of legal processes have to be completed in pursuance of the provisions of the CPC. First, a complaint or allegation has to be made to a magistrate that someone has committed an

offence; secondly, the magistrate has to take cognizance of the offence; thirdly, the magistrate, subject to certain exceptions, has to examine on oath the person making the allegation; fourthly, if the magistrate sees reason to doubt the truth of the complaint, he has to enquire into the case himself or direct a police officer to do so; fifthly, and finally, when he is satisfied that there are grounds for proceeding, he issues a summons compelling the attendance of the accused.

The processes which have taken place up to that stage are clearly proceedings in relation to the particular offence which is being investigated, and it would, in my view, be as unreal as it would be inaccurate to say that such proceedings have not been instituted merely because the magistrate does not until a later stage, issue a summons to compel the attendance of the accused. Furthermore if the issue of the summons were to be treated as the effective date for instituting proceedings, no prosecutor could be sure that they would be instituted within the statutory for instituting proceedings, no prosecutor could be sure that they be instituted within the statutory period since after making his complaint, the prosecutor no longer has any control over the time which elapses before the summons is actually issued. That depends upon the speed with which the machinery of the courts is functioning at that particular juncture; it may take a very short time or it may take several days as it did in the present instance. It is clearly not the intention of sub-s (4) of s 20 that the question whether proceedings were instituted in time should depend upon uncertain and incalculable factors outside the control of the prosecutor. In my judgment, proceedings were instituted in the present case when a complaint was made on the 5 November 1954 and therefore, since this date falls within the time limited by the Ordinance the magistrate had jurisdiction to hear the case.

This court is of the view that the learned magistrate ought to have held that there was compliance of the 90 days statutory period when the complaint was filed and registered in court on 26 April 2000 by the Ministry of Health being the relevant date to determine when the proceedings were instituted and not on the date when the respondent was charged in court on 26 June 2000. Accordingly, she ought to have held that the proceedings were instituted in accordance with the requirement under s 19(2) of the Act when the complaint was filed and registered in court on 26 April 2000. B. It is noted with much regret that the learned counsel for the respondent did not appreciate or failed to distinguish the facts in *Perumal v PP* and *Carlsberg Brewery Malaysia Bhd v Pendakwa Raya* to the issue raised in the instant appeal.

In *Perumal v PP*, his Lordship Suffian FJ dealt with the following issues and said:

1(a) Where an accused is charged for an offence under the Prevention of Corruption Act 1961 in addition or alternatively to a prescribed offence, is a *consent* required by s 26 of the Act sufficient if it authorizes the prosecution of the accused only for an offence under the Act?

(b) If the answer is in the negative, what is the effect on a trial proceeding with such *consent* only?

2 Is the point of time for institution of a prosecution within the meaning of s 26 of the Act the moment at which the court asks an accused person to plead to the charge and, if not, what is the point of time indicated?

3 If no adequate *consent* is available and no deputy public prosecutor is present at the time when an accused person is required to plead to an offence under the Prevention of Corruption Act and/or a prescribed offence, would the presence of the deputy public prosecutor as prosecutor at the hearing of the said charges against the accused on a subsequent date be deemed to be sufficient consent for institution of prosecution within the meaning of s 26?' (Emphasis added.)

In *Perumal v PP*, one of the issues raised was that the *consent* of the Public Prosecutor which was filed on a date subsequent to the date when the accused was called upon to plead, does not validate the institution of the prosecution to bring it within the meaning of s 26 of the Prevention of Corruption Act 1961. In that case, it was held that the prosecution under the Act is instituted when the accused is called upon to plead to the charge. In the instant appeal, the issue was distinctively raised as to whether the proceedings were instituted before the expiration of 90 days from the time of purchasing the food under the Act when the complain was filed and registered in court or on the date when the respondent was charged in court on 26 April 2000.

In *Carlsberg Brewery Malaysia Bhd*, there was a preliminary objection raised by counsel for the appellant that the proceedings in the magistrate's court were time barred by virtue of s 19(2) of the Act as the accused was presented with an *amended charge* on 23 October 1992. The prosecuting officer submitted that the charge was filed in the magistrate's court on 19 August 1992. In construing s 19(2) of the Act, his Lordship Mahadev Shankar J (as he then was) said:

> Section 19(2) of the Act envisages two separate events, upon the occurrence of which time begins to run. The first event is the time 'when the food was purchased by the consumer'. This time would be simultaneous with the time it was sold. In the present case, that time was 7.50pm on 20 May 1992. By s 54 of the Interpretation Act 1948 and 1967, time would begin to run from 21 May 1992. The 90 day thereafter was 18 August 1992. On 19 August therefore, 90 days had expired from the time of purchase. Since the words of s 19(2) of the Act are mandatory, no prosecution could be instituted after 18 August 1992 for the offence charged, which was the sale of the allegedly offending article.
>
> The second event envisaged by s 19(2) is the 'procuring from any person for analysis or examination'. With respect, this event is meant to cover a situation where an authorized officer under the Act exercises his power under s 5 of the Act, to demand from any vendor or manufacturer or his agent a sample for the purpose of analysis. If that is the route by which it is discovered subsequently that the article offends against s 13 of the Act, prosecution must be instituted within 90 days of the procurement.

In *Carlsberg Brewery Malaysia Bhd v Pendakwa Raya*, it is clear that the *charge* was filed in the magistrate's court two days after the expiration of the 90 days which is envisaged by s 19(2) of the Act. The learned magistrate in that case held that time starts to run the next day from the time when the Health Inspector received the offending bottle of beer, ie on 22 May 1992. He held that the proceedings were not time barred and was instituted within

A the 90 days statutory period. As pointed out by his Lordship Mahadev Shanker J (as he then was), there are two separate events under s 19(2) of the Act, one is, the time when the food is purchased by the consumer or the time when it is sold, the second event is, where an authorized officer acts under s 5 of the Act to demand from any vendor or manufacturer or agent a sample for the purposes of analysis.

B

Whereas in the instant appeal, the issue that was raised was, whether the relevant date for determining when the proceedings were instituted was the date when the information for the summons was filed and registered in court ie 26 April 2000 or on the date when the respondent was charged in court ie 26 June 2000. The learned magistrate held that the expiration of
C the 90 days period was to be determined on the date when the respondent was charged in court on 26 June 2000 and not the date when the complaint was filed and registered in court on 26 April 2000. This court is of the view that the learned magistrate ought to have held that the date when the complaint was lodged and registered in court on 26 April 2000 by the Ministry of Health was the relevant date for determining whether the
D proceedings were instituted in compliance with the requirement under s 19(2) of the Act and not the date when the respondent was first charged in court on 26 June 2000. In *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65, Suffian LP said the word 'institute' means 'to set on foot, initiate, start …'.

This court is of the view that the proceedings in the instant appeal were
E instituted against the respondent well before the expiration of the 90 days requirement as stipulated under s 19(2) of the Act. The learned magistrate had therefore erred in law when she held that the proceeding were not instituted before the expiration of 90 days from the time the food was purchased.

F It cannot be denied that the Ministry of Health or the prosecuting officer has no control over the complaint filed in court for the issuance of the summons under the Act as once it is filed and registered in court it will then all depend on the particular court as to when the magistrate is able to act on the complaint and issue the summons. There may be instances where the magistrate may have gone on leave or is away attending a course or is on
G duty outstation or on circuit. In the circumstances, does it mean that the Ministry of Health is responsible for not having issued the summons if the summons was not issued by the court against the respondent to appear in court before the expiration of the 90 days statutory period. It is the view of this court that the statutory period of 90 days cannot be calculated according to the whims and fancies of a magistrate who acts upon to issue
H the summons according to his or her convenience and that could not have been the intention of Parliament when it stipulated the 90 days requirement under the Act and that a purposive interpretation ought to be given to the requirement of the 90 days period.

In conclusion, this court is of the view that there was no requirement
I for a *sanction* under the Act and that the proceedings were rightly instituted against the respondent and within the statutory period of 90 days by the Ministry of Health when the complaint was filed and registered in court on

26 April 2000. Accordingly, the learned magistrate had the jurisdiction to hear the case and she should have overruled both the preliminary objections and proceeded with the case.

As to the order of the learned magistrate which acquitted and discharged the respondent, it is the view of this court that s 173(c) and (f) of the CPC does not empower the learned magistrate to order an acquittal without hearing the evidence of the prosecution (see *PP v Mat Zain* (1948–49) MLJ Supp 142, *Chu Chee Peng v PP* [1973] 2 MLJ 35, *PP v Zainuddin & Anor* [1986] 2 MLJ 100, *PP v Ooi Lye Seng* [1991] 2 MLJ 332, *PP v Mahmud* [1974] 1 MLJ 85, *PP v Soon Tiew Choon* [1976] 1 MLJ 189, *PP v Z* [1995] 3 AMR 2364).

Accordingly, the order of acquittal and discharge by the learned magistrate was not correct as even if she had concurred with the preliminary objections, she could have only discharged the respondent not amounting to acquittal and not grant a complete acquittal. In the circumstances, the appeal by the learned deputy public prosecutor is allowed, the order of acquittal by the learned magistrate is set aside and the case is remitted back to the Magistrate's Court, Kuala Kangsar to enable the court to record the respondent's plea. As the learned magistrate who acquitted the respondent had not heard the evidence of the prosecution, the same magistrate could hear the case. The respondent is ordered to appear before the Magistrate's Court, Kuala Kangsar.

Appeal allowed.

Reported by Lim Lee Na